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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

KLAUBER BROTHERS, INC,  
Plaintiff,

v.

ANA ACCESSORIES  
CORPORATION,

Defendant.

CV 22-03142-RSWL-JPRx

**ORDER re:  
DEFENDANT'S MOTION TO  
DISMISS [13]**

Plaintiff Klauber Brothers, Inc. ("Plaintiff") brings this Action against Defendant Ana Accessories Corporation ("Defendant") alleging copyright infringement and vicarious and/or contributory copyright infringement. Currently before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint ("Motion") [13].

Having reviewed all papers submitted pertaining to the Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:** the Court **GRANTS in part** and **DENIES in part** Defendant's Motion **WITH LEAVE TO AMEND.**

1 I. BACKGROUND

2 A. Factual Background

3 Plaintiff is a New York corporation that allegedly  
4 owns an original artwork design ("Subject Design") that  
5 it fashions into lace. Compl. ¶¶ 4, 9, ECF No. 1. To  
6 protect the Subject Design, Plaintiff owns a United  
7 States Copyright Registration, Registration No. VA 180-  
8 563. Id. ¶ 10. Plaintiff alleges it samples and sells  
9 the Subject Design lace to members in the fashion and  
10 apparel industries. Id. ¶ 11.

11 Defendant is a California corporation. Id. ¶ 5.  
12 Defendant allegedly sold infringing garments  
13 (collectively, "Garment Designs") that bear either  
14 substantially similar or identical artwork to the  
15 Subject Design.<sup>1</sup> Id. ¶ 13.

16 Plaintiff alleges these Garment Designs infringe on  
17 Plaintiff's Subject Design. Id. ¶ 18. Plaintiff  
18 alleges Defendant discovered the Subject Design by  
19 accessing a) Plaintiff's showroom and/or design library,  
20 b) stolen Subject Design copies sold by third-party  
21 vendors, c) Plaintiff's strike-offs and samples, and d)  
22 garments manufactured and sold to the public that  
23 lawfully bear the Subject Design. Id. ¶ 17.

24 Plaintiff alleges that Defendant participated and  
25 directly controlled the Garment Designs' manufacturing.

26  
27 <sup>1</sup> Plaintiff attached in its Complaint side-by-side  
28 photographs to show similarities between the Subject Design and  
the Garment Designs. Compl. ¶ 14.

1 Id. ¶ 26.

2 **B. Procedural Background**

3 On May 9, 2022, Plaintiff filed its Complaint [1].  
 4 On July 1, 2022, Defendant filed the instant Motion<sup>2</sup>  
 5 [13]. On July 27, 2022, Plaintiff opposed [17].  
 6 Defendant did not file any reply.

7 **II. DISCUSSION**

8 **A. Legal Standard**

9 Federal Rule of Civil Procedure 12(b)(6) allows a  
 10 party to move for dismissal of one or more claims if the  
 11 pleading fails to state a claim upon which relief can be  
 12 granted. A complaint must contain sufficient facts,  
 13 accepted as true, to state a plausible claim for relief.  
 14 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation  
 15 omitted). Dismissal is warranted for a "lack of a  
 16 cognizable legal theory or the absence of sufficient  
 17 facts alleged under a cognizable legal theory."  
 18 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699  
 19 (9th Cir. 1988) (citation omitted).

20 "In ruling on a 12(b)(6) motion, a court may  
 21 generally consider only allegations contained in the  
 22 pleadings, exhibits attached to the complaint, and  
 23 matters properly subject to judicial notice." Swartz v.  
 24 KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007) (citation  
 25 omitted). A court must presume all factual allegations

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26  
 27 <sup>2</sup> Defendant mistakenly filed the instant Motion [13] as an  
 28 answer instead of a motion to dismiss. The Court corrected the  
 mistake and treated the filing as a motion to dismiss.

1 to be true and draw all reasonable inferences in favor  
2 of the non-moving party. Klarfeld v. United States, 944  
3 F.2d 583, 585 (9th Cir. 1991). The question is not  
4 whether the plaintiff will ultimately prevail, but  
5 whether the plaintiff is entitled to present evidence to  
6 support the claims. Jackson v. Birmingham Bd. of Educ.,  
7 544 U.S. 167, 184 (2005) (quoting Scheuer v. Rhodes, 416  
8 U.S. 232, 236 (1974)). While a complaint need not  
9 contain detailed factual allegations, a plaintiff must  
10 provide more than "labels and conclusions" or "a  
11 formulaic recitation of the elements of a cause of  
12 action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555  
13 (2007).

#### 14 **B. Discussion**

15 Defendant seeks to dismiss Plaintiff's two claims:  
16 1) copyright infringement and 2) vicarious and/or  
17 contributory copyright infringement. See generally  
18 Def.'s Mot. to Dismiss ("Mot."), ECF No. 13.

##### 19 1. Copyright Infringement Claim<sup>3</sup>

20 To proceed with a copyright infringement claim,  
21 Plaintiff must allege (1) "ownership of a valid  
22 copyright" and (2) "copying of constituent elements of  
23 the work that are original." Twentieth Century Fox Film

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24 <sup>3</sup> Plaintiff broadly alleged infringement by pleading  
25 Defendant had offered garments for sale under the name Style No.  
26 KL4610 (Pampered Life Sheer Socks) that are "identical to or  
27 substantially similar to the Subject Design." Compl. ¶ 13.  
28 Given that this language does not contain sufficient facts to  
state a plausible claim for relief, this paragraph alone is an  
insufficient pleading for infringement.

1 Corp. v. Ent. Distrib., 429 F.3d 869, 876 (9th Cir.  
2 2005).

3 a. *Ownership*

4 A complaint is acceptable if it simply alleges  
5 "present ownership by plaintiff, registration in  
6 compliance with the applicable statute and infringement  
7 by defendant." Perfect 10, Inc. v. Cybernet Ventures,  
8 Inc., 167 F. Supp. 2d 1114, 1120 (C.D. Cal. 2001).

9 Here, Plaintiff has alleged ownership and registration  
10 in compliance with the applicable statute by pleading it  
11 owns the United States Copyright Registration for the  
12 Subject Design, Registration No. VA 180-563. Compl. ¶  
13 10. Therefore, Plaintiff has properly pled ownership.

14 b. *Copying*

15 When no direct evidence of copying is available,  
16 copying may be established by demonstrating that "the  
17 [defendant] had access to plaintiff's copyrighted work"  
18 and "the works at issue are substantially similar in  
19 their protected elements." Cavalier v. Random House,  
20 Inc., 297 F.3d 815, 822 (9th Cir. 2002) (citation  
21 omitted). In some cases, "absent evidence of access, a  
22 'striking similarity' between the works may give rise to  
23 a permissible inference of copying." Baxter v. MCA,  
24 Inc., 812 F.2d 421, 423 (9th Cir. 1987).

25 i. *Plaintiff Insufficiently Pled*

26 *Access*

27 Proof of access requires a plaintiff to show "that  
28 the defendant had an opportunity to view or to copy

1 plaintiff's work." Sid & Marty Krofft TV Prods. v.  
2 McDonald's Corp., 562 F.2d 1157, 1172 (9th Cir. 1977).  
3 "Access must be more than a bare possibility and may not  
4 be inferred through speculation or conjecture." Gaste  
5 v. Kaiserman, 863 F.2d 1061, 1066 (2d Cir. 1988). The  
6 plaintiff "must show a reasonable possibility" that  
7 defendant had access to plaintiff's work. Art Attacks  
8 Ink, Ltd. Liab. Co. v. MGA Enter. Inc., 581 F.3d 1138,  
9 1143 (9th Cir. 2009). Thus, access may be proved by  
10 either 1) "establishing a chain of events linking  
11 plaintiff's work and defendant's access," or 2) "showing  
12 that plaintiff's work has been widely disseminated."  
13 Id.

14 Plaintiff alleges that Defendant had an opportunity  
15 to view or copy the Subject Design by having access to  
16 Plaintiff's showroom, third-party vendor's copies of the  
17 Subject Design, Plaintiff's samples, and garments  
18 manufactured and sold bearing the Subject Design's  
19 print.<sup>4</sup> Compl. ¶ 17. These general opportunities  
20 neither allege that the Subject Design was widely  
21 disseminated, nor do they allege specific events linking  
22 Defendant's access to the Subject Design. Such  
23 allegations show no more than a bare possibility that  
24

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25 <sup>4</sup> Defendant argues that Plaintiff has not sufficiently pled  
26 that Defendant had access to Plaintiff's Subject Design because  
27 the Complaint does not specifically name Defendant as having  
28 access. Mot. at 12:5-9. However, in its Complaint, Plaintiff  
"alleges that Defendants . . . had access to Subject Design" and  
then lists the opportunities for access. Compl. ¶ 17.

1 Defendant had access to Plaintiff's Subject Design and  
2 therefore are insufficient to plead access. See Shame  
3 on You Prods. v. Banks, 120 F. Supp. 3d 1123, 1149 (C.D.  
4 Cal. 2015) ("To satisfy its burden of pleading access,  
5 plaintiff must allege facts 'from which a reasonable  
6 finder of fact could infer that the defendant had a  
7 reasonable opportunity to copy his or her work.'"   
8 (quoting Grubb v. KMS Patriots, L.P., 88 F.3d 1, 3 (1st  
9 Cir. 1996))).

10 *ii. Plaintiff Sufficiently Pled*

11 *Striking Similarity*

12 Works are strikingly similar when the similarities  
13 between them are so great that they are highly unlikely  
14 to have been independently created. Rentmeester v.  
15 Nike, Inc., 883 F.3d 1111, 1124 (9th Cir. 2018). In  
16 assessing whether a particular work is strikingly  
17 similar, or substantially similar, the Court performs a  
18 two-part test, an extrinsic and intrinsic test.  
19 Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980,  
20 985 (9th Cir. 2017). The extrinsic test objectively  
21 compares similarities in the works' specific expressive  
22 elements. Id. The intrinsic test looks to see whether  
23 an ordinary audience would find the works' total concept  
24 and feel to be substantially similar. Id.

25 Courts typically only analyze the extrinsic test  
26 because the intrinsic test is usually "exclusively the  
27 province of the jury." Funky Films, Inc. v. Time Warner  
28 Ent. Co., Ltd. P'ship, 462 F.3d 1072, 1077 (9th Cir.

1 2006). A plaintiff who cannot satisfy the extrinsic  
2 test loses because there must be "evidence on both the  
3 extrinsic and intrinsic tests." Id. (quoting Kouf v.  
4 Walt Disney Pictures & Tele., 16 F.3d 1042, 1045 (9th  
5 Cir. 1994)).

6 Defendant argues that Plaintiff failed to establish  
7 striking similarity in the Complaint. See Mot. 12:23-  
8 13:6. Defendant does not argue that the intrinsic test  
9 cannot be met. See id. at 13:21-24. Instead, it argues  
10 that the extrinsic test is not met because Plaintiff did  
11 not examine the similarities and compare the designs.  
12 See id. at 13:25-14:4. However, Plaintiff compared side  
13 by side in its Complaint images of the Subject Design  
14 and the Garment Designs and argued that the designs  
15 share identical or substantially similar elements,  
16 composition, arrangement, layout, and appearance.  
17 Compl. ¶¶ 13-15. These allegations satisfy the  
18 extrinsic test because Plaintiff compared the designs'  
19 specific expressive elements, and based off the provided  
20 images, the Court cannot at this time conclude that the  
21 garments are not strikingly similar. See L.A. Printex  
22 Indus. v. Macy's Retail Holdings, Inc., 2011 U.S. Dist.  
23 LEXIS 88733, at \*16 (C.D. Cal. Aug. 9, 2011) (explaining  
24 that a jury could find striking similarity when a  
25 copyrighted work and an allegedly infringing garment  
26 compared side by side show strong similarities).

27 Therefore, given that the extrinsic test can be  
28 met, and the intrinsic test is exclusively the province



1 of the jury, Plaintiff has properly alleged striking  
2 similarity. With the facts alleged, Plaintiff  
3 sufficiently pled striking similarity and "access may be  
4 inferred." Malibu Textiles, Inc. v. Label Lane Int'l,  
5 Inc., 922 F.3d 946, 952 (9th Cir. 2019). Therefore,  
6 ownership and copying have been sufficiently pled.

7 Accordingly, the Court **DENIES** Defendant's Motion on  
8 Plaintiff's copyright infringement claim.

9 2. Plaintiff's Claim for Vicarious and/or  
10 Contributory Copyright Infringement

11 Defendant seeks to dismiss Plaintiff's  
12 contributory/vicarious copyright infringement claim on  
13 the basis that Plaintiff failed to identify third-party  
14 direct infringement. See Mot. at 15:7-14. "Secondary  
15 liability for copyright infringement does not exist in  
16 the absence of direct infringement by a third party."  
17 A&M Records v. Napster, Inc., 239 F.3d 1004, 1013 n.2  
18 (9th Cir. 2000). Plaintiff therefore must identify some  
19 third party before alleging Defendant's liability for  
20 vicarious and/or contributory infringement.

21 Plaintiff attempted to identify a third party,  
22 www.dollskills.com, in its Opposition to Defendant's  
23 Motion. See Pl.'s Opp'n to Def.'s Mot. to Dismiss  
24 ("Opp'n") 9:18-20, ECF No. 17. This third party was not  
25 mentioned in the Complaint. See generally Compl. In  
26 determining whether to dismiss under Rule 12(b)(6), a  
27 "court may not look beyond the complaint to a  
28 plaintiff's moving papers, such as a memorandum in

1 opposition to a defendant's motion to dismiss." Broam  
2 v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003)  
3 (citation omitted). While this new third party alleged  
4 in the Opposition may not be considered in whether to  
5 grant or deny the Motion, it may be considered when  
6 granting leave to amend or dismissing with prejudice.  
7 Orion Tire Corp. v. Goodyear Tire & Rubber Co., 268 F.3d  
8 1133, 1137-38 (9th Cir. 2001).

9 Here, Plaintiff does not plead sufficient facts to  
10 indicate direct infringement by a third party. There is  
11 not a single third party identified in the Complaint.  
12 See generally Compl. Without establishing this  
13 preliminary requirement for a claim of  
14 contributory/vicarious copyright infringement,  
15 Plaintiff's claim fails. See Viesti Assocs. v. Pearson  
16 Educ., Inc., Civil Action No. 12-cv-02240-PAB-DW, 2013  
17 U.S. Dist. LEXIS 113323, at \*23-24 (D. Colo. Aug. 12,  
18 2013) ("Given that no third parties are identified in  
19 the complaint, [the plaintiff]'s claim that [the  
20 defendant] had the right to control these unidentified  
21 third parties is speculative and conclusory.").

22 Accordingly, the Court **GRANTS** Defendant's Motion on  
23 Plaintiff's contributory/vicarious copyright  
24 infringement claim.

25 3. Leave to Amend

26 Federal Rule of Civil Procedure 15(a)(2) provides  
27 that a party may amend its complaint once "as a matter  
28 of course" before a responsive pleading is served.

1 After that, the "party may amend its pleading only with  
2 the opposing party's written consent or the court's  
3 leave. The court should freely give leave when justice  
4 so requires." Id. Leave to amend lies "within the  
5 sound discretion of the trial court." United States v.  
6 Webb, 655 F.2d 977, 979 (9th Cir. 1981). The Ninth  
7 Circuit has noted "on several occasions . . . that the  
8 'Supreme Court has instructed the lower federal courts  
9 to heed carefully the command of Rule 15(a), Fed. R.  
10 Civ. P., by freely granting leave to amend when justice  
11 so requires.'" Gabrielson v. Montgomery Ward & Co., 785  
12 F.2d 762, 765 (9th Cir. 1986) (quoting Howey v. United  
13 States, 481 F.2d 1187, 1190 (9th Cir. 1973)).

14 Here, Plaintiff has not previously amended its  
15 Complaint. Plaintiff may be able to plead a  
16 specifically named third party for which Defendant could  
17 be liable for contributory/vicarious copyright  
18 infringement. Therefore, leave to amend would not be  
19 futile.

20 Accordingly, the Court **GRANTS LEAVE TO AMEND**  
21 regarding Plaintiff's contributory/vicarious copyright  
22 infringement claim.

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### III. CONCLUSION

Based on the foregoing, the Court **DENIES in part** Defendant's Motion as to Plaintiff's copyright infringement claim and **GRANTS in part** as to Plaintiff's contributory/vicarious copyright infringement claim **WITH LEAVE TO AMEND**. Plaintiff may file an amended complaint by no later than **October 31, 2022**.

IT IS SO ORDERED.

DATED: September 30, 2022      /s/Ronald S.W. Lew  
**HONORABLE RONALD S.W. LEW**  
 Senior U.S. District Judge